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FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

AUG 17 1983

CLERK, U. S. DISTRICT COURT  
DISTRICT OF NEVADA  
*[Signature]*  
DEPUTY

Civil R-74-34 BRT

TRUCKEE-CARSON IRRIGATION  
DISTRICT,

Plaintiff,

vs.

SECRETARY OF THE DEPARTMENT  
OF THE INTERIOR,

Defendant,

vs.

PYRAMID LAKE PAIUTE TRIBE OF  
INDIANS,

Defendant-Intervenor.

ENTERED

AUG 18 1983

CLERK, U. S. DISTRICT COURT  
DISTRICT OF NEVADA  
*[Signature]*

MEMORANDUM OPINION

This is an action by the Truckee-Carson Irrigation District to prevent the Secretary of the Interior from terminating TCID's contract to operate the Newlands Irrigation Project. The Secretary's termination of the contract was based on numerous violations of criteria issued by the Secretary concerning operation of the project. TCID seeks a declaration that these criteria are void and an injunction prohibiting termination of the contract. The Government and the Intervenor, Paiute Tribe, pray for a declaration that the Secretary of Interior has legally terminated the contract dated December 18, 1926, and has a lawful right to

1 possession and control of the Newlands Reclamation Project effective as of November 1, 1974.

3 Final decision of this case has been deliberately delayed by this Court because of the pendency of companion litigation to which the TCID was an indispensable party as the convenient representative of a large class of interested parties, namely, the owners of water rights under the Newlands Irrigation Project. Although other litigation is still pending, the two most important lawsuits have been decided: United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983) (the adjudication of use of the waters of the Carson River), and Nevada v. United States \_\_\_ U.S. \_\_\_, 51 L.W. 4974, June 24, 1983 (the adjudication of use of the waters of the Truckee River).

14 On December 18, 1926, the Secretary of the Interior (Secretary) and the Truckee-Carson Irrigation District (TCID) signed a contract which transferred the care, operation and maintenance of the Newlands Reclamation Project to TCID. Under this contract the Secretary retained the authority to issue rules and regulations concerning the operation of the project. Pursuant to this authority the Secretary has issued criteria regulating TCID's operation of the project since 1967.

22 In September 1972, the Secretary issued operating criteria for the period from November 1, 1972 through October 31, 1973. These operating criteria were challenged by the Pyramid Lake Paiute Tribe in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1972). The Tribe contended that the operating criteria allowed more water to be delivered to the project than required by applicable court decrees and statutes

1 and, thus, diverted water that otherwise would flow into Pyramid  
2 Lake. The Court reviewed the Secretary's regulations and found  
3 them to be unsupported by the administrative record. Conse-  
4 quently, the Court directed the Secretary to submit proposed  
5 amended regulations. The Court's final judgment and order in-  
6 cluded amended operating criteria which were to govern operation  
7 of the project for the remainder of the 1972-73 water year and  
8 the water year beginning November 1, 1973.

9 The approved operating criteria were mailed to TCID on  
10 March 7, 1973, and were published in the Federal Register on  
11 March 12, 1973. TCID admits, however, that these criteria were  
12 never implemented. Paragraph XVIII of the complaint reads, in  
13 part:

14 Truckee-Carson Irrigation District has re-  
15 fused and continues to refuse to comply with  
16 the so-called Operating Criteria and Proce-  
17 dures for the Newlands Reclamation Project as  
published in the Federal Register by the Act-  
ing Secretary of Interior on or about March  
12, 1973.

18 This refusal to comply with the operating criteria was substan-  
19 tiated by evidence produced at trial.

20 Richard Lattin, a member of the Board of Directors of  
21 TCID, appeared on behalf of TCID and testified to numerous viola-  
22 tions of the operating criteria. The following were among the  
23 violations Lattin testified to: (1) TCID delivered water to non-  
24 water right lands; (2) TCID allowed individuals who were not TCID  
25 employees to operate turnouts; (3) TCID did not develop a system  
26 to measure the amount of water delivered to customers; (4) TCID  
27 did not establish a system to charge for water actually delivered;  
28 and (5) TCID diverted more water from the Truckee River than

1 authorized.

2           The administrative record before the Court also evi-  
3 dences TCID's refusal to comply with the operating procedures.  
4 The record shows that diversion of water from the Truckee River  
5 exceeded the amount authorized for the months of April, May,  
6 June, July, and August of 1972. After each of these violations  
7 TCID was given notice of the excessive diversion. TCID made no  
8 effort to reduce the diversion of water and comply with the opera-  
9 ting criteria.

10           In addition to the excessive diversion of water, the  
11 record also evidences other violations of the operating criteria.  
12 The following violations were identified in a report on TCID's  
13 compliance dated May 22, 1973: (1) TCID delivered water to non-  
14 water rights lands; (2) TCID allowed individuals who were not  
15 TCID employees to operate turnouts; (3) TCID failed to develop a  
16 plan for measurement of water flows; and (5) TCID failed to sub-  
17 mit a monthly report. This compliance report was sent to TCID,  
18 yet TCID made no effort to bring itself into compliance. Conse-  
19 quently, a second compliance report dated August 8, 1973, identi-  
20 fied the same violations as the May 22nd report.

21           Confronted with TCID's continued violation of the opera-  
22 ting criteria, the Secretary chose to terminate the 1926 contract.  
23 By letter dated September 14, 1973, the Secretary notified TCID  
24 that the contract would be terminated on October 31, 1974. TCID  
25 filed the present action on March 18, 1974, to enjoin the termi-  
26 nation of the contract.

27           There are four general issues raised by the parties.  
28 The issue which must be addressed first is the Secretary's chal-

1 lence to this Court's jurisdiction based on the doctrine of  
2 sovereign immunity. The second general area of issues centers  
3 around TCID's claim that the operating criteria are invalid.  
4 TCID argues that the operating criteria are invalid because (a)  
5 the criteria were not issued in accordance with the procedure  
6 prescribed by the Administrative Procedures Act; (b) the criteria  
7 were in excess of the Secretary's authority; and (c) the criteria  
8 were arbitrary and capricious. The third general issue concerns  
9 TCID's challenge to the enforceability of the operating criteria.  
10 TCID argues that the criteria cannot be enforced because (a) TCID  
11 was not a party in Tribe v. Morton, the case in which the criteria  
12 were formulated; (b) the criteria unconstitutionally impair the  
13 1926 contract, and (c) the Secretary did not comply with the re-  
14 quirements of the National Environmental Policy Act. The fourth/  
15 issue concerns TCID's noncompliance with the operating criteria  
16 and whether this noncompliance constitutes a breach of the 1926  
17 contract.

18 I

19 SUBJECT MATTER JURISDICTION

20 Defendants have repeatedly asserted that this Court  
21 lacks subject matter jurisdiction to hear this case because of  
22 the doctrine of sovereign immunity.<sup>1/</sup> It is firmly established  
23 that "the United States, as sovereign, is immune from suit save  
24 as it consents to be sued, and the terms of consent to be sued  
25 in any court define that court's jurisdiction to entertain the  
26 suit." United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct.  
27 767, 769, 85 L.Ed. 1056 (1941). See also United States v. Testan,  
28 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). "Unless

1 sovereign immunity has been waived or does not apply, it bars  
2 equitable as well as legal remedies against the United States."  
3 Beller v. Middendorf, 632 F.2d 788, 796 (9th Cir. 1980), cert.  
4 denied, \_\_\_ U.S. \_\_\_, 101 S.Ct. 3030 (1981). Although the bound-  
5 aries of this doctrine are in a constant state of flux, their  
6 present demarcation in the Ninth Circuit indicates that sovereign  
7 immunity is not a bar to this action.

8 Paragraph II of the complaint sets forth two grounds  
9 upon which plaintiff predicates federal court jurisdiction in  
10 this action. It reads as follows:

11 The jurisdiction of this Court is  
12 invoked pursuant to the provisions of  
13 28 U.S.C. 1331(a), as the amount in  
14 controversy exceeds the sum or value  
15 of \$10,000, exclusive of interests and  
16 costs, and arises under the laws of the  
17 United States, as hereinafter more fully  
18 appears. The jurisdiction of this court  
19 is also invoked pursuant to the provi-  
20 sions of 5 U.S.C. 701-706, inclusive,  
in that plaintiff Truckee-Carson Irriga-  
tion District is suffering legal wrong  
because of agency action, or is adversely  
affected or aggrieved by agency action  
within the meaning of a relevant statute.  
This action is properly brought in this  
court against the defendant Secretary  
of Interior pursuant to 28 U.S.C. 1391(e).

21 The allegations in the complaint generally set forth  
22 the following federal questions under 28 U.S.C. § 1331: Plain-  
23 tiff has generally alleged (1) that the 1973 operating criteria  
24 were promulgated in a manner contrary to the National Environ-  
25 mental Policy Act of 1969 and the procedural due process protec-  
26 tions of the Fifth Amendment; (2) that the substance of the  
27 operating criteria violates Fifth Amendment guarantees; and (3)  
28 that the Secretary's termination of the 1926 contract pursuant to

1 the constitutionally void operating criteria was illegal. Plain-  
2 tiff's claims, therefore, fall within statutory "federal ques-  
3 tion" jurisdiction because they involve rights created by the  
4 Constitution and laws of the United States which are an essential  
5 element to the existence of each claim. In short, plaintiff  
6 challenges rules and regulations promulgated by the Secretary,  
7 and action taken pursuant thereto, which allegedly cannot be jus-  
8 tified under the Constitution or laws of the United States.

9 According to paragraph II, plaintiff has also asserted  
10 jurisdiction under the provisions of the Administrative Procedures  
11 Act (APA), 5 U.S.C. § 701, et seq. At the time this action was  
12 commenced, many courts thought that the APA, in and of itself,  
13 afforded an implied grant of subject matter jurisdiction for re-  
14 view of agency action. K.C. Davis, Administrative Law Treatise,  
15 § 23.02 (1st ed., Supp. 1982). The decision in Califano v.  
16 Sanders, 430 U.S. 99, 105, 61 L.Ed.2d 192, 97 S.Ct. 980 (1977),  
17 however, established that the APA is not an independent jurisdic-  
18 tional predicate. It is now considered sufficient to rest an  
19 action for agency review upon federal question jurisdiction.  
20 Chrysler Corp. v. Brown, 441 U.S. 281, 317 n. 47 (1979); Andrus  
21 v. Charlestone Stone Products Co., 436 U.S. 604, 607 n. 6 (1978);  
22 Glacier Park Foundation v. Watt, 663 F.2d 882, 885-86 (9th Cir.  
23 1981); McCartin v. Norton, \_\_\_ F.2d \_\_\_, decided April 22, 1982,  
24 Adv. Sh. 1659 (9th Cir. 1982). Jurisdiction of the present case  
25 rests solely upon 28 U.S.C. § 1331.

26 Although the APA provisions have lost their force as  
27 an independent jurisdictional predicate, they have taken on new  
28 significance in the area of sovereign immunity. In 1976, Congress

amended Section 702 of the Administrative Procedures Act to waive  
sovereign immunity in suits seeking judicial review of agency  
action, where the relief sought is other than money damages.  
90 Stat. 2721 (1976). Section 702, as amended, now provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Unfortunately, the parties to this action have for the most part overlooked the impact that amended Section 702 has had on the doctrine of sovereign immunity. In addressing the issue of sovereign immunity, the parties have revived pre-1976 sovereign immunity case law, principally, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 93 L.Ed.2d 1628, 69 S.Ct. 1457 (1949), and its progeny, to resolve this jurisdictional issue. In light of the recent trend in the circuit courts to apply the waiver of sovereign immunity contained in Section 702 to "non-

1 statutory"<sup>2/</sup> review actions brought under Section 1331, it is un-  
2 necessary to decide whether pre-1976 sovereign immunity law pro-  
3 vides an alternate ground, independent of 5 U.S.C. § 702, for  
4 finding sovereign immunity inapplicable to plaintiff's claim for  
5 equitable relief. This decision to apply 5 U.S.C. § 702 to the  
6 present case rests primarily upon the following cases: Rowe v.  
7 United States, 633 F.2d 799 (9th Cir. 1980), cert. denied, 101  
8 S.Ct. 2047 (1981); Beller v. Middendorf, 632 F.2d 788 (9th Cir.  
9 1980); Sheehan v. Army and Air Force Exchange Service, 619 F.2d  
10 1132 (5th Cir. 1980); Jaffe v. United States, 592 F.2d 712 (3d  
11 Cir.), cert. denied, 441 U.S. 961 (1979).

12 Thus, the waiver of sovereign immunity found in the APA  
13 applies to this case if the requirements of Section 702 are sat-  
14 isfied. Under Section 702 the lawsuit must seek relief other  
15 than money damages and state a claim that an agency or an officer  
16 or employee thereof acted or failed to act in an official capacity  
17 or under color of legal authority. It is clear that these require-  
18 ments are met in the instant case. Plaintiff's claims seek de-  
19 claratory relief from actions of the Secretary of Interior which  
20 were allegedly taken pursuant to constitutionally void rules and  
21 regulations.

## 22 II

### 23 VALIDITY OF THE OPERATING CRITERIA

#### 24 A. Promulgation of the Amended Operating Criteria.

25 The operating criteria challenged in the present case  
26 were formulated and approved by the court in Tribe v. Morton.  
27 The Secretary published the operating criteria in the Federal  
28 Register in accordance with the court order. TCID contends that

1 this method of promulgation violated the requirements of the  
2 Administrative Procedures Act (APA).

3 The APA provides the procedural standard which must be  
4 followed before an agency may take any action. Under the APA the  
5 agency is required to follow different procedures depending on  
6 whether the agency action was an adjudication or rulemaking.  
7 Thus, to determine if the proper procedure was followed, we must  
8 first determine whether the Secretary's issuance of the operating  
9 criteria involved an adjudication or rulemaking.

10 The distinction between adjudication and rulemaking is  
11 found in 5 U.S.C. § 551. "Adjudication" is defined in § 551(7)  
12 as "agency process for the formulation of an order." An "order"  
13 means "the whole or part of a final disposition . . . in a matter  
14 other than rulemaking" (emphasis added). "Rulemaking" is defined  
15 by Section 551(5) as "agency process for formulating, amending,  
16 or repealing a rule." Thus, the distinction between rulemaking  
17 and adjudication turns on the definition of "rule."

18 Section 551(4) defines "rule" as "the whole or a part  
19 of an agency statement of general or particular applicability and  
20 future effect designed to implement, interpret, or prescribe law  
21 or policy. . . ." Under this definition the operating criteria  
22 issued by the Secretary are rules. The standards contained in  
23 the operating criteria were designed to implement the policy  
24 behind the Reclamation Act of 1902. Moreover, the standards  
25 operated prospectively; they did not apply in any way to prior  
26 water years. Thus, under the APA the Secretary's issuance of the  
27 operating criteria was rulemaking and not adjudication.

28 As rulemaking, the procedure governing the issuance of

1 the operating criteria is contained in 5 U.S.C. § 553. Section  
2 553(a), however, specifically exempts an agency when making rules  
3 regarding public contracts. This exception is included "because  
4 the principal considerations in most such cases relate to mech-  
5 anics and interpretation of policy and it is deemed wise to en-  
6 courage and facilitate the issuance of rules by dispensing with  
7 all mandatory procedural requirements . . . " Duke City Lumber  
8 Co. v. Butz, 382 F.Supp. 362 (D.D.C. 1974) quoting S.Rep. No. 752,  
9 79th Cong., 1st Sess. 199 (1945). This exception embraces rules  
10 issued by an agency with respect to contracts of the United States  
11 or an agency of the United States. See Attorney General's Manual  
12 on the Administrative Procedure Act, p. 28 (1973).

13 In the present case, the Secretary's issuance of the  
14 operating criteria was pursuant to the 1926 contract, which speci-  
15 fically entrusted the Secretary with authority to issue rules and  
16 regulations. The 1926 contract is a contract between the United  
17 States and TCID. Therefore, the rules that the Secretary issues  
18 pursuant to the contract are not governed by the strictures of the  
19 APA.

20 B. Authority of the Secretary to Issue Operating Criteria.

21 TCID contends that the amended operating criteria were  
22 invalid when promulgated because they were in excess of the Secre-  
23 tary's authority. The operating criteria are claimed to exceed  
24 the Secretary's authority in three ways.

25 First, TCID claims that the requirements imposed by  
26 Section C of the operating criteria violated the Secretary's duty  
27 not to issue operating criteria which would make operation and  
28 maintenance of the irrigation project unduly expensive. The duty

1 upon which the claim relies arises from 43 U.S.C. §§ 390 and 504.  
2 Both sections authorize the Secretary to expend funds, but only  
3 within the limit of the water users' repayment ability. This  
4 limitation, however, only applies to situations where the Secre-  
5 tary has expended funds. There is no similar requirement on  
6 funds that the water district is directed to expend. See 43 U.S.  
7 C. §§ 485e, 485i, 492. The Section C requirements at issue in  
8 the present case did not require an expenditure of federal funds.  
9 The cost was to be borne directly by the water users. Therefore,  
10 the Section C requirements were not in violation of any duty of  
11 the Secretary.

12           Second, TCID contends that the operating criteria's  
13 provision for upstream storage of water at Stampede Reservoir  
14 violates 43 U.S.C. § 523. Section 523 provides, in part:

15           Whenever in carrying out the provisions  
16 of the reclamation law, storage or carry-  
17 ing capacity has been or may be provided  
18 in excess of the requirements of the lands  
19 to be irrigated under any project, the  
20 Secretary of the Interior, preserving a  
21 first right to lands and entrymen under  
22 the project, is hereby authorized, upon  
23 such terms as he may determine to be just  
24 and equitable, to contract for the impound-  
25 ing, storage, and carriage of water to an  
26 extent not exceeding such excess capacity  
27 with irrigation systems operating under  
28 the Act of August eighteenth, eighteen hun-  
dred and ninety-four, known as the Carey  
Act [43 USCS § 641], and individuals, cor-  
porations, associations, and irrigation  
districts organized for or engaged in fur-  
nishing or in distributing water for irri-  
gation.

26 TCID contends that this section requires the Secretary to enter  
27 a contract for storage of the water before he may issue a regula-  
28 tion requiring the upstream storage.

1           The contract requirement of Section 523 was designed to  
2 cover situations in which one irrigation system has water in ex-  
3 cess of the amount required. In such a situation, the Secretary  
4 may contract for the transfer of the excess water to another  
5 irrigation system. The provision for upstream storage of water  
6 at Stampede Reservoir does not, however, dispose of excess water  
7 to another irrigation system. The provision merely coordinates  
8 the storage of water between Stampede Reservoir and Lahontan  
9 Reservoir. Since this provision for alternative storage did not  
10 transfer water to another system, Section 523 did not require the  
11 Secretary to enter a contract concerning the upstream storage.

12           Third, TCID contends that the Secretary did not have  
13 authority to limit TCID's diversion of water from the Truckee  
14 River to 350,000 acre feet for the water year ending October 31,  
15 1973. This contention is without merit. The 1926 contract pre-  
16 serves the Secretary's right to issue rules and regulations.  
17 This includes the right to limit diversion of water from the  
18 Truckee River.

19           TCID, however, contends that the Secretary exceeded his  
20 authority by issuing regulations which were in violation of the  
21 Orr Ditch Decree. The Orr Ditch Decree granted the United States  
22 the right to divert water from the Truckee River for irrigation  
23 of the project. This water is "under such control, disposal and  
24 regulation as the [United States] may make or desire." The only  
25 limitation on the Secretary's ability to regulate the water  
26 supply is an upper limit. Here, the Secretary issued a regula-  
27 tion reducing the amount of water to be diverted. Consequently,  
28 the reduction was within the Secretary's authority.

1 C. Arbitrary and Capricious.

2 TCID contends that the operating criteria are invalid  
3 because the Secretary's promulgation of the criteria was "arbi-  
4 trary, capricious, an abuse of discretion, or otherwise not in  
5 accordance with law" in violation of 5 U.S.C. § 706(2)(A). To  
6 determine whether the Secretary's action was in violation of this  
7 section, the Court must "consider whether the decision was based  
8 on a consideration of the relevant factors and whether there has  
9 been a clear error of judgment." Citizens to Preserve Overton  
10 Park v. Volpe, 401 U.S. 402, 416 (1971).

11 The operating criteria under review in the present case  
12 were promulgated by the Secretary under the guidance of Judge  
13 Gesell. The court in Tribe v. Morton had ordered the Secretary  
14 to reconsider the written recommendations in the administrative  
15 record in light of his responsibility to the Newlands Project and  
16 the Pyramid Lake Indians. The final form of the operating cri-  
17 teria approved by Judge Gesell were found to be consistent with  
18 the Secretary's legal and fiduciary obligations. Tribe v. Morton,  
19 354 F.Supp. at 261. This finding is not binding but it does in-  
20 dicate that relevant factors were considered and that no error  
21 of judgment was made. TCID has provided no evidence which would  
22 indicate that relevant factors were not considered or that the  
23 criteria approved by the court were clearly errors of judgment.  
24 Therefore, TCID's claim that Section 706(2)(A) has been violated  
25 must be denied.

26 III

27 ENFORCEABILITY OF THE OPERATING CRITERIA

28 ///

1 A. Due Process Clause.

2 The key issue in the present case is whether the operat-  
3 ing criteria approved by Judge Gesell in Tribe v. Morton can be  
4 enforced against TCID. TCID contends that the operating criteria  
5 were in essence a court order and that imposition of the operat-  
6 ing criteria upon it results in the enforcement of a judgment  
7 rendered in a suit to which it was not a party.

8 TCID is correct in contending that due process requires  
9 that an individual not be bound by a judgment rendered in litiga-  
10 tion to which the individual was not a party. Hansberry v. Lee,  
11 311 U.S. 32 (1940); Mallow v. Hinde, 25 U.S. 193 (1827). The  
12 strictures of due process, however, only apply where the absent  
13 party will be deprived of interests encompassed by the Fourteenth  
14 Amendment's protection of liberty and property. Board of Regents  
15 v. Roth, 408 U.S. 564, 569 (1971). Thus, before TCID may argue  
16 that the judgment in Tribe v. Morton deprived it of due process,  
17 it must demonstrate that an interest within the Fourteenth Amend-  
18 ment's protection is at stake. Id. at 571.

19 TCID contends that the operating criteria approved by  
20 the court in Tribe v. Morton have deprived it of three distinct  
21 property interests. First, TCID contends that the reduction in  
22 the amount of water which may be diverted from the Truckee River  
23 has deprived it of non-project water rights in Donner Lake and  
24 Independence Lake. The operating criteria, however, do not pur-  
25 port to alter TCID water rights in either lake. The criteria  
26 merely prohibit transporting water by means of the federally owned  
27 canal if such diversion into the canal would exceed the limit  
28

1 established by the operating criteria. Thus, the operating cri-  
2 teria do not affect the non-project water rights, they only regu-  
3 late the use of the federally owned canal.

4 Second, TCID contends that the Truckee River Agreement  
5 (TRA) granted it a right to the excess "diverted flow" reaching  
6 Derby Dam. TCID claims that this is a water right which it holds  
7 independent of the irrigation project and, thus, is a right which  
8 cannot be limited by the Secretary's operating criteria. The TRA,  
9 however, was not an adjudication of water rights. It was an  
10 agreement among the major water users and was subject to the final  
11 disposition of United States v. Orr Water Ditch Co., No. A-3.

12 The final adjudication came in the form of the Orr Ditch Decree,  
13 which granted the United States a specific amount of water for  
14 use on the Newlands Project. No water rights were given to TCID  
15 as an entity. TCID's only interest in the water rights granted  
16 the United States by the Orr Ditch Decree arises from its manage-  
17 ment of the irrigation project under the 1926 contract. In this  
18 capacity, TCID's right to water is under the direct control and  
19 regulation of the Secretary. Thus, TCID's contention that the  
20 TRA grants it water rights independent of the irrigation project  
21 and the Secretary's control is without merit.

22 Third, TCID contends that the operating criteria have  
23 deprived it of the right to the continued operation of the irriga-  
24 tion project under the contract terms as they were originally  
25 formulated. TCID, however, had no right to continue the operation  
26 of the project in any specific manner. Under Article 7 of the  
27 1926 contract, TCID agreed to operate and maintain the project in  
28 full compliance with "the rules and regulations of the Secretary

1 now in force or hereafter promulgated." The contract further  
2 provides:

3 34. The Secretary reserves the right,  
4 so far as the purport thereof may be con-  
5 sistent with the provisions of this con-  
6 tract, to make reasonable rules and regu-  
7 lations, and to add to and modify them as  
8 may be deemed proper, and necessary to  
9 carry out the true intent and meaning of  
the law and of this contract, and the  
District hereby agrees that in the opera-  
tion of the transferred works, all such  
rules and regulations will be fully adhered  
to.

10 Since the Secretary had the right to change the regulations at  
11 any time, TCID could not have a property interest in the continued  
12 operation of the project in any specific manner. ~

13 TCID has failed to establish that it was deprived of  
14 any property interest by the operating criteria approved by the  
15 court in Tribe v. Morton. Consequently, imposition of the operat-  
16 ing criteria upon TCID did not deprive it of due process.

17 B. Impairment of Contract.

18 TCID contends that the Secretary's enforcement of the  
19 operating criteria has impaired the 1926 contract in violation of  
20 the due process clause. The due process clause, like the contract  
21 clause limitation on states, prevents the federal government from  
22 rearranging contractual rights and responsibilities. See North-  
23 western National Life Ins. Co. v. Jordan, 447 F.Supp. 856 (D.Nev.  
24 1978). TCID contends that the operating criteria's limitation on  
25 the diversion of water from the Truckee River has impaired its  
26 right under the contract to use water for power generation, for  
27 the pasture land, and for expansion of the project.

28 The Secretary has the right to promulgate rules and

1 regulations governing operation of the irrigation project. With-  
2 in this power is the authority to limit water diverted from the  
3 Truckee River to that being beneficially used by those holding  
4 water rights. The Secretary's exercise of the power did not un-  
5 constitutionally impair the rights claimed by TCID because water  
6 used for the claimed rights may be restricted. The use of project  
7 water for power generation is secondary to its use for irrigation  
8 and, thus, may be restricted by the Secretary. See Burley Irr.  
9 Dist. v. Ickes, 116 F.2d 529 (D.C.Cir. 1940). The use of project  
10 water to irrigate the pasture land may also be restricted since  
11 there are no decreed water rights for use by direct diversion on  
12 the pasture land. United States v. Alpine Land & Reservoir Co.,  
13 503 F.Supp. 877, 882 (D.C. Nev. 1980). Finally, water may be  
14 used to expand the irrigated acreage only to the extent that  
15 water rights are obtained for the additional land. Thus, TCID's  
16 claim that the reduction in water to be diverted impaired its  
17 contract must fail, since water for the rights allegedly impaired  
18 may be limited by the Secretary in a good faith effort to avoid  
19 waste of water diverted from the Truckee River.

20 C. National Environmental Policy Act (NEPA).

21 TCID contends that enforcement of the operating cri-  
22 teria will violate NEPA because a reduction in the amount of  
23 water to be diverted at Derby Dam will have a significant effect  
24 on the quality of the environment. TCID is not the proper party  
25 to raise the issue.

26 TCID's purpose in pursuing the NEPA claim was not to  
27 promote governmental awareness of environmental problems, but was  
28 to protect its interest in continuing to operate the irrigation

1 project. NEPA was not intended to protect plaintiffs, such as  
2 TCID, whose sole motivation is their own economic self-interest  
3 and welfare. See Port of Astoria, Oregon v. Hodel, 595 F.2d 467  
4 (9th Cir. 1979); Churchill Truck Lines, Inc. v. United States,  
5 533 F.2d 411 (8th Cir. 1976); Clinton Community Hospital Cor. v.  
6 So. Md. Medical Center, 510 F.2d 1037 (4th Cir. 1975); American  
7 Motorcyclist Ass'n v. Watt, 534 F.Supp. 923 (C.D.Calif. 1981);  
8 Benton County Savings & Loan v. Federal Home Loan Bank Bd., 450  
9 F.Supp. 884 (W.D.Ark. 1978).

#### 10 IV

#### 11 NONCOMPLIANCE WITH THE OPERATING CRITERIA

12 As previously discussed, the operating criteria were  
13 valid and enforceable regulations and, thus, TCID was required by  
14 the 1926 contract to implement them. The evidence uniformly  
15 demonstrates that TCID failed to comply with the criteria. This  
16 was a breach of the 1926 contract. Under the 1926 contract, the  
17 Secretary may terminate the contract for breach upon one year's  
18 written notice to TCID. The Secretary complied with this provi-  
19 sion by mailing TCID a letter, dated September 16, 1973, which  
20 notified TCID that the contract would be terminated on October  
21 31, 1974.

22 In a final effort to avoid the consequences of non-  
23 compliance, TCID argues that its breach of the contract is excused  
24 because compliance was financially impossible. Impossibility of  
25 performance is a valid defense in an action for breach of contract  
26 where an extraordinary circumstance has made performance so  
27 vitally different from what was expected as to alter the essential  
28 nature of performance. In the present case, however, the im-

1 possibility claim is not appropriate for two reasons: First,  
2 this is not an action for breach of contract. TCID has raised  
3 the impossibility claim offensively to reform the contract, in-  
4 stead of defensively. This is not a permissible use of the im-  
5 possibility doctrine. Even if this claim were properly raised,  
6 it would fail because the Secretary's issuance of the operating  
7 criteria was not an extraordinary circumstance. Paragraphs 7 and  
8 34 of the 1926 contract demonstrate that the parties contemplated  
9 the Secretary's periodic issuance of rules and regulations and  
10 operating criteria have been issued since 1967. TCID's financial  
11 inability to comply with the regulations does not turn this into  
12 an extraordinary event excusing performance. Restatement (Second)  
13 Contracts, § 261 Comment b (1981); 17 Am.Jur.2d Contracts, §  
14 402 (1964).

15         The evidence demonstrates that TCID made no attempt to  
16 comply with the operating criteria issued by the Secretary on  
17 March 12, 1973. TCID has tried to avoid the consequences of its  
18 refusal to comply by contending that the operating criteria were  
19 invalid and unenforceable. The merits of these contentions have  
20 been considered and rejected. Our rationale is that the 1973  
21 operating criteria must be shown to be void for TCID to sustain  
22 its position. This it cannot do. They clearly fall within the  
23 ambit of Secretarial power to prescribe rules and regulations  
24 under the 1926 contract.

25         This action poses a unique case procedurally and jur-  
26 dically. We do not question the right of the Paiute Tribe to  
27 attack the 1972 operating criteria as arbitrary, capricious and  
28 an abuse of the Secretary's authority. The Tribe chose to do so

1 by action in the District Court for the District of Columbia,  
2 naming only The Secretary of Interior as a defendant. It chose  
3 not to name as defendants its true opponents, the Lahonton Project  
4 farmers represented by the TCID. The district court chose not  
5 to require the joinder of the TCID. The TCID chose not to inter-  
6 vene as a real party in interest. Thus, the action proceeded as  
7 an ex parte action in a substantial sense, the Secretary of In-  
8 terior being pretty much in the position of a stakeholder. The  
9 final result was the promulgation of the 1973 operating criteria  
10 at the direction of the court. The Secretary was unquestionably  
11 subject to the jurisdiction of the court, and was in jeopardy of  
12 contempt if he disdained to comply. The Department of Justice  
13 refused to appeal.

14 There are portions of the District of Columbia decree  
15 which cause one to ponder. The opinion does not show that the  
16 finding that 288,120 acre feet diversion through the Truckee  
17 Canal would ultimately be adequate was any less of a "judgment  
18 call" than the 1972 allowed diversion of 378,000 acre feet. Also,  
19 it is not at all clear to this Court that the District of Colum-  
20 bia court's directive to the Secretary to invoke the sanctions of  
21 Article 32 of the 1926 contract (354 F.Supp. 265) was within the  
22 competence and authority of the judge.

23 Nevertheless, the position adopted by the TCID is even  
24 more difficult to understand. First, we note that before amended  
25 operating criteria were issued, the TCID notified the Secretary  
26 that it would not comply (354 F.Supp. 258). Such an attitude of  
27 complete defiance is incomprehensible.

28 In briefs both the Secretary and the Tribe assert that

1 the remedy that the TCID should have pursued was an action against  
2 the Secretary, presumably in the District of Nevada, attacking  
3 the validity of the 1973 operating criteria on the same grounds  
4 that it has asserted here defensively. In fact, in oral argument,  
5 the government attorney, Mr. McElroy, asserted: "This happens  
6 all the time." That may be so, but we have failed to find any  
7 reported precedent which parallels the procedural conflict which  
8 faces us here. This is not the normal case of rules and regula-  
9 tions promulgated in the implementation of a government contract  
10 in which only the rights and interests of the government and the  
11 other contracting party are at issue. Here, the administration  
12 of the Lahonton Project affects the rights of many parties other  
13 than the two contracting parties. It is juridically offensive  
14 to this Court to contemplate a situation where in February 1973  
15 a federal district court has supervised the issuance of new  
16 operating criteria, and in April 1973 another district court is  
17 requested to invalidate them as arbitrary, capricious and in  
18 excess of authority. But this possibility seems to be acceptable  
19 in view of the defect in parties in the initial action.

20       Whatever one may think of such a situation, it is  
21 nonetheless clear that self-help to the extent to which TCID  
22 availed itself is not the remedy. It could not defy the regula-  
23 tions and after notification of contract termination defend upon  
24 the ground that if it had presented its case by intervention in  
25 the District of Columbia court or if it had prior to termination  
26 attacked the new regulations in a Nevada court, grounds for ter-  
27 mination of the contract would not have existed.

28       In consideration of the premises,

1 IT HEREBY IS ORDERED that plaintiff take nothing by  
2 virtue of its complaint and it is hereby declared that the Secre-  
3 tary of Interior has legally terminated the contract dated Decem-  
4 ber 18, 1926, and has a lawful right to possession and control of  
5 the Newlands Reclamation Project effective as of November 1,  
6 1974.

7 DATED August 17, 1983.

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10 UNITED STATES DISTRICT JUDGE  
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## FOOTNOTES

1/ There is no question that the defendants have raised the issue of sovereign immunity in their attack on this court's jurisdiction. It is not so clear, however, whether they are also contending that plaintiff's claim can only be brought in the Court of Claims because it is primarily a contract action against the United States involving a claim in excess of \$10,000 which under the Tucker Act, 28 U.S.C. § 1491, lies within the exclusive jurisdiction of the Court of Claims. This argument is suggested at page 32 of defendants' post-trial brief.

Assuming that defendants have made this argument, the Tucker Act does not require that this case be brought in the Court of Claims. The Tucker Act applies only to claims for money damages. It is generally recognized that the Court of Claims' jurisdiction cannot be avoided by a complaint that appears to seek only equitable relief when the "real effort of the complaining party is to obtain money [in excess of \$10,000] from the federal government" Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), quoting from Bakersfield City School District v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979). In the instant case, plaintiff has made no effort to seek monetary damages either expressly or impliedly. Its sole request is for declaratory and injunctive relief. If plaintiff's request should be granted, the outcome will not result in the equivalent of money damages. Therefore, it cannot be said that plaintiff's "real effort" is to obtain money from the federal government which would require this court to decline jurisdiction to hear the case. Finally, it should be noted that a district court does not lose jurisdiction over a claim for non-monetary relief simply because the claim may later be the basis for a money judgment. Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981).

2/ For a thorough analysis of this trend, see K. Kavis, Administrative Law Treatise, Chap. 27 (1st ed., Supp. 1982).